Supreme Court, U.S.
FILED

94 276 AUG 12 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

MICHAEL EDWARD NICHOLS,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. BOTSFORD
Counsel Of Record

BOTSFORD & SAUER, L.L.P.
100 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 480-9764
(512) 476-8434 (FAX)

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

QUESTION PRESENTED

WHETHER THE FOURTH AMENDMENT PROHIBITS FIREMEN FROM FORCIBLY ENTERING A BUILDING ADJACENT TO A FIRE SCENE TO CHECK FOR "FIRE EXTENSION" WITHOUT A WARRANT WHEN:

(a) THE ADJACENT BUILDING RECEIVED ONLY MINIMAL COSMETIC DAMAGE FROM THE MAIN FIRE,

(b) THERE WAS NO INVESTIGATION OF THE EXTERIOR OF THE ADJACENT BUILDING TO ASCERTAIN IF THERE WAS ANY REASON TO CHECK THE ADJACENT BUILDING FOR "FIRE EXTENSION,"

(c) THERE WAS NO SMOKE OR FIRE SEEN COMING FROM THE ADJACENT BUILDING IN THE HOURS PRECEDING THE FORCIBLE ENTRY,

(d) THE FORCIBLE ENTRY OCCURRED NO LESS THAN TWO HOURS AFTER THE FIRE AT THE STRUCTURE WHICH COMPRISED THE FIRE SCENE HAD BEEN EXTINGUISHED AND FOUR HOURS AFTER THE SINGEING OF THE ADJACENT BUILDING, AND

(e) THE ARSON INVESTIGATOR WHO INITIATED THE FORCIBLE ENTRY BY THE FIREMEN DID NOT SEEK THE CONSENT OF THE PROPERTY OWNER DESPITE THE OWNER'S PRESENCE AT THE TIME OF THE FORCIBLE ENTRY?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE PETITION 6

1. "FIRE EXTENSION" SEARCHES PRESENT AN ISSUE OF FIRST IMPRESSION AND NATION-WIDE IMPORTANCE FOR THIS COURT 6

2. THE DECISION OF THE COURT BELOW RUNS COUNTER TO THE WELL-ESTABLISHED PRECEDENT OF THIS COURT 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Camara v. Municipal Court, 387 U.S. 523 (1967)..... 8

McDonald v. United States, 335 U.S. 451 (1948)..... 9

Michigan v. Clifford, 464 U.S. 287 (1984) 6, 9, 11

Michigan v. Tyler, 436 U.S. 499 (1978)..... 6, 9, 11

Mincey v. Arizona, 437 U.S. 385 (1978)..... 8

Terry v. Ohio, 392 U.S. 1 (1968)..... 11

United States v. Nichols, 977 F.2d 972 (5th Cir. 1992) 1

United States v. Nichols, No. 93-8506 (5th Cir. 1994) 1

OTHER:

18 U.S.C. § 3231..... 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291..... 1

OPINIONS BELOW

Petitioner's trial on drug charges terminated when the district court, *sua sponte*, declared a mistrial. 3 R. 168-69. Petitioner unsuccessfully pursued a double jeopardy motion and appeal. *See United States v. Nichols*, 977 F.2d 972 (5th Cir. 1992).

The district court then held a special hearing on Petitioner's motion to suppress. 7 R. 1-102. After the district court entered a written order denying the motion, 2 R. 288-292, Petitioner entered a conditional plea of guilty. 2 R. 288-292. Petitioner was sentenced to a term of 240 months. 2 R. 303-306.

The Court of Appeals affirmed Petitioner's conviction in an unpublished *per curiam* opinion on April 25, 1994. *United States v. Nichols*, No. 93-8506 (5th Cir. 1994). *See* Appendix A. Petitioner's timely petition for rehearing was denied on May 20, 1994. *See* Appendix B.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched and the items to be seized."

STATEMENT OF THE CASE

At approximately 4:30 a.m. on the morning of July 12, 1991, Assistant Chief Mobley of the Pedernales Volunteer Fire Department responded to a call from the Travis County Sheriff's Department concerning a fire at a rural location outside of Austin, Texas. 4 R 96/7-8. After briefly taking a wrong turn Mobley and his team arrived at the scene of the fire at 4:45 a.m. 4 R 108/3-5.

When Mobley arrived at the fire, Petitioner's residence was totally engulfed in flames. 4 R 100/11-12. By 5:15 a.m. the firemen began fighting the blaze which at that time was at its greatest intensity. 4 R 113-14/20-2. It was at this time that the upper corner of Petitioner's small outbuilding ("the shed") was momentarily singed by the fire that was consuming his residence. 4 R 114-15/11-2. The fire fighters quickly responded to the singeing by applying water on the small shed; quickly extinguishing the singeing. 4 R 114-15/3-17. Petitioner's residence was completely consumed by the fire within thirty minutes. 4 R 107/8-15. The fire was under control shortly after daylight. 4 R 102/8-10. Sunrise on July 12, 1991, occurred at 6:38 a.m. 7 R 18/2-13.

As soon as the fire was under control, Mobley ordered "mop-up" operations to begin. 4 R 102/8-12, 116.

The "mop-up" consisted of going into the remains of the burnt residence in an effort to extinguish "all hot spots" and to ensure that the fire would not "rekindle." 4 R 102/13-16. At this time, according to Mobley "the main part of the emergency" had passed. 7 R 69/12-15.

The adjacent, small shed was singed only once throughout the fire that engulfed Petitioner's residence. The adjacent shed was eleven feet, six inches from the residence that was destroyed by the fire. 7 R 28/21-23. Interposed between the residence and the adjacent shed was a cedar tree. 3 R 15-16/22-24, 60/6-11; 4 R 111/10-12. The cedar tree did not catch on fire but was merely killed by the heat. 3 R 15-16/22-11; 4 R 111/13-16. *For three hours* after the adjacent shed was superficially and momentarily singed, *nothing happened to or at the shed* except that the firemen periodically continued to apply water to it to keep it cool and to make sure that there was no potential for a fire to begin. 4 R 117-19/7-6. Mobley testified that between 8:15 a.m. and 9:15 a.m., he *thought* the small shed *may* have been smoldering. 4 R 120/11-15. His response at that time was to continue applying water off and on. 4 R 121/16-18.

At 9:15 a.m., *some four hours after the small shed had suffered minimal cosmetic singeing on one corner of the roof and at least two hours after the fire crew had begun stand down "mop-up" operations,* Mobley and Bruce Allyn, an arson investigator with the Travis County Sheriff's Office who arrived on the scene sometime after 8:00 a.m., decided Mobley needed to enter the adjacent shed in order to check for fire extension. This decision was made without any investigation of the possibility of "fire extension." No one inspected the adjacent shed to see if it was

hot, no smoke was seen coming from it, and no one even noticed a window at the back of the shed. Furthermore, despite the presence of Petitioner's wife at the scene of the fire, *no one asked her for permission to enter the shed.* 3 R. 73/14-19. After forcibly removing an opaque piece of plexiglass covering a window opening over the front door of the adjacent shed, Mobley and Allyn discovered chemicals which could be used in the manufacture of methamphetamine. *See for example,* 3 R 25/2-8; 4 R 105/11-12. 3 R 13/14-20.

The fire *at the main residence* did rekindle at least once and the fire department returned to put it out. 3 R 25/16-19. However, not even the fire department considered that an emergency situation; as demonstrated by their casual return without sirens or lights. 7 R 71-72/15-2. The adjacent shed, of course, never rekindled because it had never caught on fire: it had only been momentarily singed. 7 R 57/16-20.

SUMMARY OF ARGUMENT

Certiorari should be granted to provide guidance to lower courts on the novel issues presented by Petitioner's case. Certiorari should also be granted to maintain conformity with the well-established precedent of this Court.

Petitioner's case presents an issue of first impression before this Court. While this Court has outlined the general Fourth Amendment considerations for post-fire investigations of fire scenes, no opinion from this Court addresses the different problems involved where the search is of an **adjacent structure** rather than the scene of

the fire itself. Separate privacy interests are involved. Indeed, the adjacent structure might even be separately owned. Under such circumstances, this Court should hold that the Fourth Amendment requires a separate evaluation as to whether a warrant, consent, or separate exigent circumstances exist as to **the adjacent structure itself** before entry and a search is permissible. On the facts of this case, this Court should hold that the firemen and police officers on the scene were required to engage in a meaningful, nonintrusive investigation of the outside of the adjacent structure before entry into the separate structure was permissible under the Fourth Amendment.

Furthermore, the opinion below is inconsistent with what precedent this Court has established in this area. No exigent circumstances justified the intrusion. Even if exigent circumstances existed, the officials at the scene exceeded the permissible scope of their authority by entering the shed. And finally, in spite of the presence of one of the two owners, no effort was made to obtain consent prior to the entry. In short there was no emergency or any other ground to justify the warrantless, forcible invasion into Petitioner's shed. Firemen should not be permitted to use "fire extension" as an excuse to forcibly enter and search buildings adjacent to a fire scene: this does violence to the Fourth Amendment.

REASONS FOR GRANTING THE PETITION

1. "FIRE EXTENSION" SEARCHES PRESENT AN ISSUE OF FIRST IMPRESSION AND NATION-WIDE IMPORTANCE FOR THIS COURT.

This case presents an issue of first impression before this Court. This Court has outlined the general Fourth Amendment constraints on searches, administrative or otherwise, at the scene where a fire has occurred. *See Michigan v. Tyler*, 436 U.S. 499 (1978); *Michigan v. Clifford*, 464 U.S. 287 (1984). However, no opinion from this Court addresses the Fourth Amendment interests present where, as here, the search takes place **at an adjacent structure.** Separate privacy interests are at stake in such circumstances and this Court should make clear that those interests are to be safeguarded.

Mobley and Allyn searched a separate building from the one that was destroyed by fire. Viewed properly, this fact is critical. This Court should consider the following analogy. If a fire occurred at Homeowner A's residence, surely state officials would not have the authority to enter Homeowner B's residence without a warrant where there had only been minor cosmetic damage to Homeowner B's residence. The district court pointed out that no one would dispute that the Petitioner had a privacy interest in his shed. Order at 5. The fact that the Petitioner owned both the house and the shed does not lessen his privacy interest. Therefore, Petitioner's shed should be treated like Homeowner B's residence: absent some separate exigent circumstance at the Petitioner's shed, the warrantless search was impermissible.

Guidance from this Court on this issue is important. There are important national ramifications. Particularly in urban areas where separate dwellings are much closer together, decisions like the one below will encourage widespread invasion of adjacent structures, homes, and apartments. Some of these searches for "fire extension" will almost certainly be general, exploratory searches or searches for evidence of criminal activity. Regardless, however, of whether such intrusions occur in bad faith, they ought to be limited by the concerns inherent in the Fourth Amendment.

The issue, coupled with the facts, present a compelling case for certiorari to be granted to address the separate Fourth Amendment issues. A separate structure was forcibly entered under the alleged exigency of "fire extension." The district court presumed that a fire at one structure created an exigent circumstance at an adjacent one without any investigation by the fire officials to determine whether there was a legitimate need to check for fire extension and notwithstanding the presence of an owner who could have either given or withheld consent. This Court should grant certiorari to address this issue.

2. THE DECISION OF THE COURT BELOW RUNS COUNTER TO THE WELL-ESTABLISHED PRECEDENT OF THIS COURT.

It is undisputed that the initial entry into Petitioner's secured shed was made without a warrant. The Fourth Amendment mandates that a warrantless search is *per se* unreasonable and that it is the government who bears a heavy burden in justifying such a flagrant violation of

constitutional rights. *Mincey v. Arizona*, 437 U.S. 385 (1978). It is also axiomatic that the warrant requirement generally applies to firemen and other government officials as well as police officers. *Camara v. Municipal Court*, 387 U.S. 523 (1967). The Government sought to excuse the search of the adjacent building on the grounds of exigent circumstances and the trial court and Court of Appeals have agreed with this theory. The Government contends that Mobley and Allyn were justified in searching the adjacent shed in an effort to check for "fire extension." 3 R 111-115. The district court accepted the Government's exigent circumstance theory as a justification which precluded the need for a warrant. Order at 2. The district court also found that the search was reasonable in scope given the exigency. Order at 2.

The cumulative evidence at both suppression hearings and the aborted trial disputes this theory. Even taking the factual findings of the district court as correct, *no independent exigent circumstances existed with regard to the small shed which would justify the warrantless entry at the time the search was made.* In addition, there was no justification for an actual entry into the shed since an adequate investigation to check for fire extension could have been made in a less intrusive manner.

A. No Exigent Circumstances Existed.

No exigent circumstances existed at the time that Mobley and Allyn forced their way into the adjacent shed. Any emergency which may have existed with regard to the singeing of the upper corner of the adjacent shed had "come and gone." 7 R 34/17. Therefore, all

evidence obtained by means of the unlawful intrusion as well as the fruits gathered as a result, should have been suppressed by the district court.

This Court has held that exigent circumstances means a "grave emergency." *McDonald v. United States*, 335 U.S. 451 (1948). This Court has held further that "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.'" *Tyler*, 436 U.S. at 509. Once present on the scene, the officials can remain on the scene for a "reasonable time" to investigate the cause of the fire. *Id.* at 511. After this "reasonable" period has expired, further investigation will require a warrant. *Id.* A plurality of this Court has also stated that " . . . an **immediate** threat that the blaze might **rekindle** presents an exigency that would justify a warrantless and nonconsensual postfire investigation." *Clifford*, 464 U.S. at 293 n.4 (emphasis added). The search conducted by Mobley and Allyn, however, was not justified by any immediate threat or exigency that the shed would "rekindle."

The record conclusively reflects that there was no immediate exigency surrounding the adjacent shed. The shed itself was barely singed by the fire which consumed Petitioner's residence. The superficial damage occurred at approximately 5:15 a.m. and was dealt with immediately by the firemen on hand. 4 R 108/18-23, 114-15/3-2. The fire at Petitioner's residence was completely suppressed by 7:00 a.m. at the latest. Shortly thereafter, the fire crew began "mopping-up." Defense expert Shanley testified that this was the time when checking for "fire extension" would have been an emergency priority. 7 R 35/5-11.

However, Mobley and Allyn did not investigate the shed at that time to ascertain if there was any realistic possibility that the cosmetic singeing of the upper corner could have spread to any other portion of the shed and did not forcibly enter the shed at that time. Mobley stated that he was not concerned with the shed. 3 R 25/4-8. They waited more than two hours before forcibly breaking into the shed at 9:15 a.m. 4 R 127/4-25. That time, Shanley indicated, was "three hours too late, and the danger of the fire spreading to that building [was] already gone." 7 R 40-41/23-14.

The condition of the shed confirmed Shanley's observations. The charring to the shed was superficial. 7 R 27/8-12. It would have been "plainly obvious" by 9:15 a.m. if the shed had the potential to catch fire. 7 R 42/1-3. Mobley stated he saw no fire on the shed. 3 R 25/4-8. Allyn indicated that no smoke was coming from the shed at the time he and Mobley entered it. 3 R 68/11-13. Yet, Shanley stated that had there actually been a fire in the shed, smoke would certainly have been visible. 7 R 56-57/20-23.

The district court erroneously gave relevance to the fact that the fire department had to return to the scene to put out fires that had rekindled in the debris of the residence that had been totally destroyed by the fire. Whatever rekindling that may have occurred in the rubble of the residence did not affect the adjacent shed in any way. However, more importantly, Mobley and Allyn had no way of knowing that the rekindling of the residential rubble would occur. The Government cannot rely on subsequent events to create an exigency and justify a

search which had occurred the day before. *See Tyler*, 436 U.S. at 505-506.[1]

B. Even If Exigent Circumstances Existed, Allyn and Mobley Exceeded The Scope of Their Lawful Authority by *Entering* The Shed Without a Warrant.

The scope of a permissible investigation, however, is still constrained by Fourth Amendment concerns. An intrusion without a warrant must be "strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio*, 392 U.S. 1 (1968). Even a justifiable search "may be no broader than reasonably necessary to achieve its end." *Clifford*, 464 U.S. at 294-295. Put another way, "an administrative search into the cause of a recent fire does not give fire officials license to roam freely through the fire victim's private residence." *Id.* at 298. Since there were adequate means by which Mobley and Allyn could have checked for "fire extension" *short of actual entry into the adjacent shed*, their intrusion into the shed was unlawful and any evidence derived from the search should have been suppressed.

---

[1] In *Tyler*, this Court rejected an analogous contention, holding that a warrantless search cannot be justified after the fact by discovery of evidence indicating arson. Specifically, this Court held that "it is, of course, impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." *Tyler*, 98 S.Ct. at 1948. Similarly an "emergency" the day after a warrantless search cannot be used to justify the initial search.

James Shanley offered a variety of straightforward, less intrusive alternatives than actual physical entry into the shed. Looking for smoke would have been the easiest method. 7 R 36/7. However, the record clearly indicates that no smoke was coming from the shed. 3 R 68/11-16, 102/17-20. A basic examination of the exterior of the shed would have been in order. However, it was essentially admitted that not even a cursory examination of the shed was ever made by Mobley or Allyn prior to their forcible entry. For instance, Mobley was not even aware that there was a window on the opposite side of the shed! 7 R 72/18-23. According to Shanley, the exterior of the shed might have been felt for warmth and the superficial charring examined to see if there was any possibility that the fire had penetrated through to the inside. 7 R 35-36/12-20. Neither Mobley nor Allyn performed any of these basic examinations. 7 R 72-73.

The district court misconstrued Petitioner's argument in this regard. Petitioner does not contend that Mobley and Allyn were negligent in the manner in which they searched for fire extension. Order at 2. Their method was certainly effective. However, the problem was that their method was violative of the Fourth Amendment. Nor did Shanley "unequivocally testif[y] that he would have looked inside the shed before leaving the scene." Order at 9. Shanley stated clearly that he would have checked the shed, *externally, in the manner described above.* 7 R 53-54/17-6. He also stated that to be absolutely thorough it was possible to look into the shed to see what was inside. 7 R 54/10-11. Petitioner does not dispute the efficacy of the search only its intrusiveness.

C. No One At The Scene Obtained Consent To Search The Shed In Spite Of The Fact That An Owner Of The Premises Was Present Throughout The Time Of The Fire.

Finally, it bears emphasis that Mobley and Allyn could have easily asked the wife of Petitioner, who was present at the scene of the fire prior to and during the forcible entry into the shed, for permission to enter the shed. Strangely, no one asked her consent to enter the adjacent shed until after Mobley and Allyn had made their initial, forcible intrusion into the adjacent shed. 3 R 73/14-19. There were many ways that Mobley and Allyn could have checked for "fire extension" consistent with the Fourth Amendment. Unfortunately, a forcible entry without even seeking consent of the owner hours after the cosmetic damage had been inflicted to the shed does not comport with the Fourth Amendment.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

David L. Botsford
Counsel of Record

Botsford & Sauer, L.L.P.
100 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 480-9764
(512) 476-8434 (FAX)

Attorney for Petitioner

APPENDIX A

OPINION OF FIFTH CIRCUIT

APRIL 25, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8506
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

MICHAEL EDWARD NICHOLS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A 91 CR 102)

(Filed Apr. 25, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

After some initial missteps in his prosecution, appellant Nichols pleaded guilty to one count of attempted manufacture of methamphetamine conditioned on his right to appeal the denial of his motion to suppress evidence. After two hearings, the district court concluded that voluntary fireman Mobley and deputy sheriff Allyn reasonably decided to open an opaque plexiglass window into a shed that stood a mere 11 1/2 feet from a burning building and had been singed by the fire. Further, he found that their purpose was to contain the spread of the fire rather than to search for evidence of criminal activity. Finding no error in the trial court's rejection of Nichols' Fourth Amendment claim that the shed should not have been "searched", we affirm.

Appellant's basic quarrel seems to be with the district court's fact finding on disputed evidence that there was a possibility even two hours after the principal fire had been put out that the fire would rekindle in the singed shed where the methamphetamine lab was ultimately found. Based on the evidence presented, this finding is not clearly erroneous. Appellant also contends that the actions of the fireman and deputy sheriff intruded unreasonably into the shed for their expressed purposes, but again, the district court's finding to the contrary is well supported by the evidence.

On appeal, appellant also argues that the fire department's "search" for fire extension into the shed was illegal because it was not conducted pursuant to any written policy and, alternatively, that it was illegal because the Pedernales Fire Department was acting outside of their jurisdiction in fighting the fire in the first place. There is

neither legal support for the first contention nor factual support for the second one. We reject these contentions.

AFFIRMED.

APPENDIX B

OPINION OF 5TH CIRCUIT ON REHEARING

MAY 20, 1994

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8506

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL EDWARD NICHOLS,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING

(May 20, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones 5/19/94
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.